IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
LETTERS PATENT APPEAL NO.122 OF 2002
IN
WRIT PETITION NO.1114 OF 2002

1. Shri Mehmood Gafur Kazi
Age: 62 years,
Occ: retired, residing
at Room No.22, Railway
Compound, Ekta Nagar/
Navy Nagar, Dockyard
Road, Bombay-400 010.

2. Mr. Fahim
s/o Abubakar Kazi,
Age 27 years, Occ: Service,
residing at 306 Lucky Villa,
2 Newkant Wadi, Perry Cross
Road, Bandra (West),
Bombay-400 051. .... Appellants

- Versus -

1. Shri Jabbar Yusuf Kazi
Age about 62 years,
residing at Kalkaicha-Kond
Dapoli, Taluka Dapoli,
Dist: Ratnagiri.

2. Mr. Ashraf Gulam Kazi
Age about 38 years
residing at Kalkaicha-Kond
Dapoli, Taluka Dapoli,
Dist: Ratnagiri.

3. Kazi Rehman Kazi
is a Trust PTR No.B-157,
Dapoli, Taluka Dapoli,
District: Ratnagiri.

4. Mrs. Razia Ibrahim Kazi
Aged about 44 years,
residing at & Post Dapoli,
Taluka Dapoli,
District: Ratnagiri.

5. Mrs. Gohar Sagir Sarguro
residing at Sarguro
Hospital, Kelaskar Naka,
Bazar Peth, Tal. Dapoli,
District: Ratnagiri.

6. Dr. Sagir Munir Khan
Sarguro,
residing at Sarguro
Hospital, Kelaskar Naka,
Bazar Peth, Tal. Dapoli,
District: Ratnagiri.

7. Mr. Sattar Aziz Bhokare
c/o Razia Ibrahim Kazi
residing at & Post Dapoli,
Kaikaicha Kond, Tal. Dapoli,
District: Ratnagiri.

8. Mr. Shabbir Aziz Bhokare
c/o Razia Ibrahim Kazi
residing at & Post Dapoli,
Kaikaicha Kond, Tal. Dapoli,
District: Ratnagiri.

9. Mr. Ramesh Maruti Bhekare
At & Post: Talsure,
Tal.Dapoli, Dist: Ratnagiri.

10. Mr. Farhan Mehmood Kazi
Age 22 years, Occ: Trustee,
residing at R.No.22, Railway
Compound, Ekta Nagar/Navy
Nagar, Dockyard Road,
Bombay-400 010.

11. Ms Shahin
D/o Abubakar Kazi,
Age 24 years.

12. Ms Shabnam
D/o Abubakar Kazi,
Age 47 years.

13. Mrs. Shahnaz W/o Abubakar
Kazi

respondent Nos.11 to
13, residing at 306 Lucky
Villa-2, Newkant Wadi,
Perry Cross Road, Bandra
West, Bombay-400 015.

14. Mrs. Dilara W/o Ismail Kazi
Age 37 years, residing at
2nd Floor, Chetan Apartment,
Pooja Nagar, Mira Road East,
Thane District.

15. The Charity Commissioner,
Bombay.

16. The State of Maharashtra .... Respondents

Shri Shriram S. Kulkarni for the Appellants.

Shri S.M. Oak for the Respondent No.9.

Shri R.M. Patne, Asst. Government Pleader,
for the Respondent Nos.15 and 16.

WITH

LETTERS PATENT APPEAL NO.123 OF 2002
IN
WRIT PETITION NO.1113 OF 2002

1. Shri Mehmood Gafur Kazi
Age: 62 years,
Occ: retired, residing
at Room No.22, Railway
Compound, Ekta Nagar/
Navy Nagar, Dockyard
Road, Bombay-400 010.

2. Mr. Fahim
s/o Abubakar Kazi,
Age 27 years, Occ: Service,
residing at 306 Lucky Villa,
2 Newkant Wadi, Perry Cross
Road, Bandra (West),
Bombay-400 051. .... Appellants

- Versus -

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Dapoli, Taluka Dapoli,
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2. Mr. Ashraf Gulam Kazi
Age about 38 years
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Dapoli, Taluka Dapoli,
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is a Trust PTR No.B-157,
Dapoli, Taluka Dapoli,

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Aged about 44 years,
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District: Ratnagiri.

5. Mrs. Gohar Sagir Sarguro
residing at Sarguro
Hospital, Kelaskar Naka,
Bazar Peth, Tal. Dapoli,
District: Ratnagiri.

6. Dr. Sagir Munir Khan
Sarguro,
residing at Sarguro
Hospital, Kelaskar Naka,
Bazar Peth, Tal. Dapoli,
District: Ratnagiri.

7. Mr. Sattar Aziz Bhokare
c/o Razia Ibrahim Kazi
residing at & Post Dapoli,
Kaikaicha Kond, Tal. Dapoli,
District: Ratnagiri.

8. Mr. Shabbir Aziz Bhokare
c/o Razia Ibrahim Kazi
residing at & Post Dapoli,
Kaikaicha Kond, Tal. Dapoli,
District: Ratnagiri.

9. Mrs. Vrinda Sharad Bal
Age about 40 years,
residing at 9 Agarkar
Bhavan, L.B.S. Marg,
Pune-411 030.

10. Mr. Farhan Mehmood Kazi
Age 22 years, Occ: Trustee,
residing at R.No.22, Railway
Compound, Ekta Nagar/Navy
Nagar, Dockyard Road,
Bombay-400 010.

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D/o Abubakar Kazi,
Age 24 years.

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respondent Nos.11 to
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14. Mrs. Dilara W/o Ismail Kazi
Age 37 years, residing at
2nd Floor, Chetan Apartment,
Pooja Nagar, Mira Road East,
Thane District.

15. The Charity Commissioner,
Bombay.

16. The State of Maharashtra .... Respondents

Shri Shriram S. Kulkarni for the Appellants.

Sarvasri N.H. Seervai, Senior Counsel, with
G.S. Godbole for the Respondent No.9.

Shri R.M. Patne, Asst. Government Pleader,
for the Respondent Nos.15 and 16.

CORAM: R.M.S. KHANDEPARKAR &
Mrs. ROSHAN DALVI, JJ.

DATED: MARCH 27, 2006

JUDGMENT (Per R.M.S. Khandeparkar, J.):

1. Since common questions of law and facts arise in both the appeals, they were heard together and are being disposed of by this common Judgment.

2. Heard. The present appeals arise from the orders dated 22-2-2002 passed by the learned single Judge in Writ Petition Stamp Nos.47306 and 47299 of 2001. Vide the impugned orders, the learned single Judge has

dismissed both the writ petitions filed by the appellants. The appellants had filed the said writ petitions seeking declaration that the order passed in terms of the Consent Terms arrived at in Writ Petition No.5930 of 2000 to be bad in law, having obtained the same by playing fraud upon the Court.

3. The learned single Judge while dismissing the said writ petitions has observed that the challenge to the order based on Consent Terms in the Writ Petition No.5930 of 2000 and the sanction granted by the Charity Commissioner was on the ground of lack of jurisdiction and the Court being misled about the applicability of the Bombay Public Trusts Act when in fact the Wakf Act was applicable to the matter in issue. The learned single Judge took note of the decisions of the Apex Court in **S.P. Changal Varaya Naidu (dead) by LRs v. Jagannath (dead) by LRs and others** {(1994) 1 SCC 1} and **Chairanjilal Shrilal Goenka v. Jasjit Singh and others** {(1993) 2 SCC 507} and held that those decisions are not applicable in the facts and circumstances of the case in hand, and thereby dismissed the petition by the impugned orders.

4. It has been strenuously argued on behalf of the appellants that bare perusal of the Consent Terms would show that the change report submitted to the Assistant

Charity Commissioner and accepted by him under the order dated 13-5-1996 was sought to be withdrawn, along with the challenge to the change report. Similarly, application for framing scheme under Section 50-A was also withdrawn and the order passed by the Assistant Charity Commissioner for framing of the scheme was set aside along with the consequential appointment of the trustees. The outgoing trustees had accepted the respondent No.1 and one Ashraf Gulam Mohammed Kazi and considered that they would not object for proceedings to be taken out for their appointment as the trustees. However, the incoming trustees had accepted the change for consideration of an amount of Rs.8.50 lakhs and had ratified the sale made by the outgoing trustees in respect of 490 gunthas of land in favour of Bal Developers. Similarly, the application to set aside the sanction under Section 36(2) bearing No.J-32/97 was disposed as withdrawn and further the amount paid by the outgoing trustees in favour of the respondent No.9 was confirmed on acceptance of additional amount of Rs.1.50 lakh and accordingly the writ petitions were disposed of. This, according to the appellants, amounts to fraud played upon the Court by the parties to the said petitions in collusion with each other and the entire proceedings were without jurisdiction because the provisions of the Wakf Act, 1995 were applicable. Reliance is placed in the decision of the Apex Court in

Ramchandra Ganpat Shinde and another v. State of Maharashtra and others, reported in AIR 1994 SC 1673. It is the contention on behalf of the appellants that when the parties act in collusion with each other to obtain an order by abuse of process of Court by playing fraud upon the Court, it becomes the obligation of the Court to recall such an order obtained by the parties by playing fraud upon the Court.

5. Plain reading of the impugned orders undoubtedly discloses that the learned single Judge even though recorded various contentions sought to be raised for filing the writ petitions to challenge the order passed in earlier writ petition, neither there was discussion on those points nor any finding arrived at in that regard in the impugned orders. The orders merely narrate those submissions and refer to two Supreme Court Judgments and observation that the decisions of the Apex Court are not applicable to the facts of the case and therefore the petitions have been summarily rejected. Apparently, the impugned orders do not disclose reasons for summary dismissal of the petition. Nevertheless, it is also strenuously argued on behalf of the respondents that no writ petition would be maintainable to seek a declaration that the order passed in earlier writ petition is bad in law. In case of allegation of fraud, there would be disputed questions of fact and it would

not be possible to adjudicate upon such disputed questions of fact in writ petition. If the party is aggrieved by the order, the remedy lies somewhere else and not by way of a second writ petition.

6. Undoubtedly, the challenge in the Writ Petition Stamp Nos.47306 and 47299 of 2001, hereinafter called as "the second writ petitions" was to the consent order passed in Writ Petition No.5930 of 2000, hereinafter called as "the first writ petition" on the ground that the said consent order was obtained by misleading the Court as well as by playing fraud upon the Court in the sense that the petitioners in the first petition had given up challenge to the illegal orders, which were otherwise challenged in the first petition, by accepting additional amount and at the cost of the interest of the Trust and by surrendering to the illegal orders passed by the Charity Commissioner. In other words, the interest of the Trust was not sought to be protected, rather by causing loss to the Trust, the personal interest of the parties to the petition was sought to be attained and that too by misleading the Court.

7. Undoubtedly, as observed above, the learned single Judge has not considered the challenge on merits nor has he dealt with the point as to whether such a challenge by way of a second writ petition would be maintainable.

Indeed the impugned orders do not disclose any reasoning for dismissal of the petitions. The learned Advocates for the respondents, however, have submitted that in any case no such second writ petition would be maintainable to seek a declaration that the consent order obtained in the first petition is bad in law. According to the learned Advocates, the decision of the Supreme Court in **Ramchandra Ganpat Shinde's** case (supra) is of no help to the appellants. That was a case wherein two parties had colluded with each other and had played fraud upon the Court and had obtained an Order of Minutes by consent, without knowledge to any member of the society and there was no denial of the allegations in that regard and in the background of absence of any denial of the allegations, necessary inference which was to be unerringly deduced was that the consent order was collusive and fraudulent order and therefore it was ruled that:

> "the order passed by the High Court under Art. 226 is a judicial order exercising its constituent power but when its process is abused and obtained an order of minutes by consent hedged with collusion and fraud on the Court and obviously, though not pleaded, on general body of the members of the

> society, when the facts were brought to the notice of the High Court, it is the High Court alone or on appeal this Court to correct such an order."

8. The Apex Court indeed while dealing with a case wherein there was specific allegation that the Chairman of the defunct committee of the society in collusion with one More, who was the co-director and another person by name Mule, alleged to be his friend, got the first writ petition filed and obtained a direction to conduct election following its heels got filed second writ petition with a format of legal process but immediately the Chairman intervened and appeared on the very date of admission, put forth consent order and obtained the order from the Court to conduct election as per the provisional list existing as on 30-6-1992 and got issued the direction to the Collector with the mandate to conduct election in accordance with that list. It was specifically alleged that Patil, the ex-chairman, colluded with More and Mule, abused the process of the Court, played fraud on the Court and obtained Minute Order by consent without knowledge to any member of the society and in the absence of any denial of those allegations, the necessary inference which was to be unerringly deduced was that the consent order was collusive and fraudulent order contrary to the

statutory mandate of Rule 4(1) of the Election Rules and that none of the members of the society had any opportunity to know or to oppose the consent order. Thereby the necessary conclusion was that a collusive order obtained by abuse of the process of the Court by playing fraud on the Court, became foundation to conduct elections to the Managing Committee of the society circumventing the mandate of Rule 4(1) of the Election Rules. In those circumstances, question which was considered was whether the said order was liable to be interfered with and if so, in what proceedings and to what extent. It was observed by the Apex Court that the order in the second writ petition cannot be reviewed because the appellants before the Apex Court were not parties to the proceedings. Besides, the orders passed by the High Court under Article 226 are in exercise of plenary constituent power and jurisdiction. It can neither be called as void or voidable order. In the case before the Apex Court, it was a matter where by consent orders of Minutes were drawn up which became the foundation for avoidance of mandate of Rule 4(1) of the Election Rules and it was not a case of irregularity in exercise of jurisdiction so as to set it right by review. Besides, third party had no right to file an application for review. Obviously, the order being vitiated by collusion, the appellants could have filed appeal under Article 136 with the leave of the Apex

Court but instead a fresh Writ Petition under Article 226 was preferred to seek modification of the order passed in the second writ petition so that it could be in conformity with Rule 4(1) of the Election Rules. In those circumstances, the Apex Court ruled as above. Obviously therefore, the decision of the Apex Court was in a case wherein by the consent order, the parties had misled the Court to pass an order contrary to the mandate of the Election Rules. It was also prejudicial to the interest of the members of the society. In those circumstances, the Apex Court observed that, though proper remedy would be appeal under Article 136 with the leave of the Apex Court, in a piquant situation like that in the case before it when the facts disclosed abuse of powers and fraud having been played upon the Court in obtaining order by consent and it was brought to the notice of the High Court, nothing prevented the High Court from correcting such order and the same could be done by way of filing a second writ petition.

9. Whether in the case in hand the consent order amounts to fraud being played or whether the Court was misled or not, as already observed above, the learned single Judge has not at all addressed these issues while passing the impugned orders. Once the Apex Court has held that in a case where the order would apparently disclose, or in the absence of challenge to the

allegation based on factual matrix would unerringly reveal, abuse of process and fraud being played upon the Court in obtaining the order, nothing could prevent the High Court from recalling such order, even in the proceedings initiated in the form of a second writ petition.

10. In the circumstances, therefore, we are left with no alternative than to set aside the impugned orders and to remand the same before learned single Judge to consider whether the order passed in the first writ petition was obtained either by misleading the Court by way of abuse of process or by playing fraud upon the Court and to pass appropriate order based on the findings to be arrived at in relation to the said points.

11. In the result, the appeals succeed. The same are allowed and the impugned orders are hereby set aside and the matters are remanded to learned single Judge to hear the petitions afresh and to pass an appropriate order, in accordance with the provisions of law. There shall be no order as to costs.

(Mrs. Roshan Dalvi, J.) (R.M.S.Khandeparkar, J.)

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